

David J. Miclean (#115098/miclean@fr.com)
FISH & RICHARDSON P.C.
500 Arguello Street, Suite 500
Redwood City, California 94063
Telephone: (650) 839-5070
Facsimile: (650) 839-5071

Lisa M. Martens (#195824/martens@fr.com)
Andrew M. Abrams (#229698/abrams@fr.com)
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, California 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Attorneys for Plaintiff and
Counterclaim Defendant
APPLE INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(OAKLAND DIVISION)

APPLE INC.,

Plaintiff,

v.

PODFITNESS, INC., and DOES 1-100,
inclusive,

Defendants.

Case No. C 06-5805 SBA

**DECLARATION OF GREG JOSWIAK IN
SUPPORT OF APPLE INC.'S
OPPOSITION TO DEFENDANT
PODFITNESS, INC.'S PARTIAL MOTION
FOR SUMMARY JUDGMENT**

Date: June 3, 2008
Time: 1:00 pm
Courtroom: 3, 3rd Floor
Judge: Hon. Sandra B. Armstrong

PODFITNESS, INC.,

Counterclaim Plaintiff

v.

APPLE INC.,

Counterclaim Defendant

I, Greg Joswiak, declare as follows:

1. I am Vice President of Worldwide iPod Product Marketing for Apple Inc.

1 (“Apple”). I have personal knowledge of the matters stated in this declaration and would testify
2 truthfully to them if called upon to do so.

3 2. As of the end of the fiscal year 2007, the iPod had sold over 140 million units
4 worldwide, making it the best-selling digital audio player series in history.

5 3. Neither Steve Jobs nor Apple have ever authorized the use of his name or of the
6 IPOD brand in connection with Defendant’s services; nor have they ever been affiliated with or
7 sponsored Defendant’s services.

8 4. Apple has not consented to any of Defendant’s uses of its IPOD mark or its
9 product images, nor any mark comprised in whole or part of POD, nor has Apple sponsored,
10 endorsed or approved the goods or services offered and promoted by Defendant. Nor is there any
11 affiliation between Apple and Defendant.

12 5. In the seven years that Apple has been continuously using the IPOD mark in
13 interstate commerce, it has spent hundreds of millions of dollars advertising and promoting its
14 goods and services under the IPOD mark in a variety of media, including but not limited to
15 television, radio, a wide variety of general circulation and specialized print media, billboards,
16 trade shows and the Internet.

17 6. Apple’s technical analysis of the Podfitness software confirms that it does not fit
18 the accepted definition of a podcast.

19 7. As a result of the product’s popularity in connection with fitness activities, Apple
20 markets and sells iPod-compatible arm bands to facilitate the use of the iPod player while
21 exercising.

22 8. Apple has also partnered with shoe manufacturer Nike to market the Nike+iPod
23 Sports Kit, which is a device which measures and records the distance and pace of a walk or run.

24 9. Apple’s iTunes Store features numerous downloadable podcasts, “iMixes” (pre-
25 made audio file mixes), and celebrity playlists which incorporate a fitness theme.

26 10. Such products compete directly with Defendant’s audio files, and are marketed to
27 consumers under a link entitled “Nike Sport Music,” a true and correct depiction of which is
28 attached hereto as Exhibit 1.

1 11. Apple already licenses its MADE FOR IPOD logo to several companies in
2 connection with their exercise machines, including ICON Health and Fitness, Horizon Fitness,
3 Life Fitness, Cybex and Unisen Limited.

4 12. In the future, Apple intends to continue to expand its existing line of fitness
5 products and services.

6 13. Defendant's logo also appears in two-tone green, the same color utilized by Apple
7 in connection with the promotion of its iPod Shuffle, true and correct depictions of which are
8 attached hereto as Exhibit 2.

9 I declare under penalty of perjury under the laws of the United States of America
10 that the foregoing is true and correct.

11 Executed this 25 day of April, 2008, at Cupertino, California.

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14 Greg Joswiak

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PROOF OF SERVICE

I am employed in the County of San Diego. My business address is Fish & Richardson P.C., 12390 El Camino Real, San Diego, California 92130. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On April 28, 2008, I caused a copy of the following document(s):

**DECLARATION OF GREG JOSWIAK IN SUPPORT OF APPLE INC.'S
OPPOSITION TO DEFENDANT PODFITNESS, INC.'S PARTIAL MOTION
FOR SUMMARY JUDGMENT**

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

James E. Magleby	Attorneys for Defendant
Jason A. McNeill	PODFITNESS, INC.
Magleby & Greenwood, P.C.	
170 South Main Street, Suite 350	
Salt Lake City, UT 84101	
(801) 359-9011 (facsimile)	

<input checked="" type="checkbox"/>	FEDERAL EXPRESS:	Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express
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James M. Wagstaffe	Attorneys for Defendant
Kerr & Wagstaffe LLP	PODFITNESS, INC.
100 Spear Street, Suite 1800	
San Francisco, CA 94105-1528	
(415) 371-0500 (facsimile)	

<input checked="" type="checkbox"/>	PERSONAL:	Such envelope was delivered by hand to the offices of the addressee.
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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the above is true and correct. Executed on April 28, 2008, at San Diego, California.

/s/ Nicole C. Pino

Nicole C. Pino